Choy Ching Wan @ Chua Cheng Wan (P) v Land Development Specialist Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–555 OF 1996
ABDUL MALIK ISHAK J
15 SEPTEMBER 2006

Civil Procedure — Trial — Witness — Witness statement — Purpose and functions of

Contract — Damages — Breach — Breach of undertaking — Second defendant's plea that he had no knowledge of the letter of undertaking — Second defendant's denial of the existence of the letter of undertaking — Whether plaintiff had abandoned the apartment — Whether plaintiff's legal interests affected — Whether plaintiff was denied of her right and entitlement to the apartment — Apartment sold to third party — Compensatory principle — Whether plaintiff entitled to exemplary damages

The plaintiff filed a suit against the defendants and sought, inter alia, for the following reliefs; (a) that the first defendant, its servants and agents deliver possession of the said apartment to the plaintiff; (b) that an order for the specific performance of the undertaking dated 18 May 1990 or alternatively for an order for specific performance pursuant to the consent/agreement of all the shareholders of the first defendant's company to transfer the said apartment to the plaintiff; and (c) for a declaration that the first defendant is holding the said apartment as a trustee for the benefit of the plaintiff. The plaintiff also claimed against the second defendant for, inter alia, that: (a) the second defendant, its servants and agents deliver possession of the said apartment to the plaintiff; (b) damages for the breaking into of the said apartment to be assessed; and (c) interests, costs and other reliefs as may be just and equitable. The facts which led to the filing of this suit arose from a squabble between the plaintiff and the defendant over an apartment known as No A1, Desaria Apartment, Taman Gembira, Jalan Mesraria, Kuala Lumpur (hereinafter referred to as the 'apartment'). The plaintiff alleged that in 1987, the plaintiff's late father had given the plaintiff the apartment. The plaintiff then took possession of the apartment in early 1988 and the apartment was then extensively renovated. Subsequently, in May 1988, the plaintiff moved into the apartment with her family. Thereafter, at a Chinese New Year family reunion dinner in 1989, the late Mr Chua Khay Leong (the

plaintiff's late father) declared to the family members gathered thereat of his intention to give the apartment to the plaintiff as a gift. All the male siblings of the late Mr Chua Khay Leong who were also the directors and shareholders in the family first defendant's company were present at the said gathering and had agreed and consented that the apartment be given to the plaintiff as a gift. The apartment which was the subject matter of this dispute was built on a piece of land that the plaintiff's late father had purchased in the name of his second wife and his two sons by the first wife. The land was subsequently transferred to the name of the first defendant's company. At the behest of the plaintiff's late father, the second defendant prepared a letter of undertaking dated 18 May 1990 which was to be signed by all the directors of the first defendant's company to effect the transfer of the apartment to the plaintiff upon issuance of the strata title. According to the plaintiff, her late father handed over to her the letter of undertaking dated 18 May 1990 which had already been signed by her eldest brother, Chua Seow Guan and her youngest brother (the second defendant). The plaintiff then handed the letter of undertaking to her other brother, Chua Thiam Kin for him to sign. Upon the death of the plaintiff's late father in 1992, the second defendant then took control of almost the entire business empire left by the late father. The plaintiff also alleged that due to the assistance that the plaintiff rendered to Chua Ching Siew (the Plaintiff's sister), the second defendant was irked and this made him turn against the plaintiff. It was submitted for the plaintiff that the second defendant had alleged and framed a story to the effect that the plaintiff was a tenant of the first defendant's company and that the plaintiff was in arrears of rentals for all the years she was in occupation of the apartment in question. The plaintiff realised the significance of the original letter of undertaking that had not been returned to her by one of her brothers by the name of Chua Thiam Kin to whom she had handed the original letter of undertaking and who had informed her that he had misplaced it. The plaintiff then took out the copy of the letter of undertaking that was in her possession and asked her brother by the name of Chua Thiam Kin and another brother by the name of Chua Thiam Siew who were and are the directors and shareholders of the first defendant's company to sign the letter of undertaking. There was evidence to show that the second defendant had broken into the plaintiff's apartment while she was away in Singapore and had changed the lock to the apartment and had kept her completely out of the apartment. Faced with this predicament, the plaintiff had no choice but to file this action against the first defendant's company as well as the second defendant who had forcibly taken possession of the said apartment and had deprived the plaintiff of the possession and occupation of the same.

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff had kept all the invoices of the items and materials that she

had ordered way back in 1988 in order to renovate the said apartment at the total costs of RM50,000. Not only did she have the invoices, she also kept the photographs and negatives of the specific renovations done to the said apartment. To say the least, those invoices and photographs were indeed useful to substantiate her claim that renovation works had been done to the said apartment. A document, whether it is a parchment or a piece of paper and whether it is crumpled or torn, it constitutes, once produced, a piece of real evidence [*R v Rice* [1963] 1 QB 857] (see para 16).

(2) A witness statement is a written statement of the witness by way of an affidavit and it is received as evidence in chief. It contains the evidence of the witness. The furnishing of the witness statement to the other party is designed to promote the fair disposal of the proceeding as well as to save costs. The witness statement would identify the real issues and it encourages the parties to make an appropriate admission of fact. It removes the element of surprise and it gives the cross-examining party the advantage of knowing in advance what each witness will say in his examination-in-chief. By giving his evidence-in-chief by way of an affidavit, the witness is using his own words and the statement is made from the witness's own knowledge. In short, the witness statement is equivalent to the oral evidence which the witness would, if called to testify, give in evidence (see para 35).

(3) In the amended statement of defence, the defendants pleaded that they had no knowledge of the existence of the letter of undertaking and in the alternative the defendants averred that if there was a letter of undertaking, which was denied, that letter of undertaking was signed by only two of the directors of the first defendant. But, under cross-examination, the second defendant admitted that at the request of his late father he had prepared the letter of undertaking and that he had requested his late father to have the letter of undertaking signed by all the directors and shareholders of the first defendant. The second defendant further admitted that he had prepared an undated letter and that he had handed the said letter together with the letter of undertaking to his late father. This piece of evidence certainly was consistent with the plaintiff's evidence where the plaintiff had stated that the original letter of undertaking and a copy thereof together with an undated letter were given to her by her late father. So, it can be surmised that the second defendant's plea that he had no knowledge of the letter of undertaking in the amended statement of defence and the denial of the existence of the letter of undertaking was therefore false and untrue (see para 41).

(4) The second defendant knew very well that there was an original as well

as a copy of the letter of undertaking and that original was the one which the second defendant and Chua Thiam Kin (SP3) had signed upon (see para 46).

(5) The second defendant was totally dishonest and had lied in court when he testified that the first defendant had resolved in the director's meeting that was held on 5 February 1997 to the effect that it would seek possession of the apartment and the resolution was ratified by the first defendant's directors in the AGM that was held on 23 June 1997 (see para 47).

(6) The plaintiff testified that she was in continuous occupation of the apartment until she followed her husband to Singapore in April 1991. The plaintiff proceeded further and had produced evidence to show that she had possession of the apartment until the second defendant broke into her apartment on 14 August 1996. The evidence was in the form of electricity and water bills that were issued by the authorities in 1996 and which bills she had paid in 1996. All these showed that the second defendant had concocted the story that the plaintiff had abandoned the apartment in 1991 (see paras 48–50).

(7) The plaintiff has succeeded in establishing that her legal interests were affected. In the amended reply to the defendants' defence, the plaintiff pleaded that she is the beneficial owner of the apartment and that the first defendant is holding the said apartment on trust for the plaintiff. And at para 11 of the plaintiff's amended reply and defence to the counterclaim, the plaintiff pleaded that her claim is, amongst others, based on contract, trust, trespass and estoppel. The plaintiff had pleaded her case succinctly. The pleadings were drafted professionally and it reflected the pith and depth of her claim (see para 55).

(8) In view of the fact that the second defendant is the only director and shareholder of the first defendant who had after agreeing and executing the letter of undertaking dated 18 May 1990 denied the plaintiff of her right and entitlement to the said apartment and had willfully and in breach of trust of that undertaking sold off the apartment to a third party, an order must now be made against the defendants for the damages suffered by the plaintiff to be assessed by the senior assistant registrar (see para 50).

(9) The sum awarded for breach of contract or, as happened here, for breach of the undertaking to give the apartment to the plaintiff will be calculated so as to compensate the injured party rather than to recover any profit made by the party in breach. The plaintiff was also entitled to be awarded exemplary damages for the conduct of the second

defendant in selling the apartment to a third party when the trial was ongoing thereby depriving the plaintiff of obtaining the remedy of specific performance (see para 58).

Plaintif telah memfailkan guaman terhadap defendan-defendan dan memohon, antara lain, untuk relief-relief berikut (a) bahawa defendan pertama, pekerja-pekerjanya dan agen-agennya menyerahkan milikan pangsapuri tersebut kepada plaintif; (b) bahawa satu perintah perlaksanaan spesifik untuk akujanji bertarikh 18 Mei 1990 atau alternatifnya untuk satu perintah perlaksanaan spesifik menurut kepada kebenaran/perjanjian kesemua pemegang saham dalam syarikat defendan pertama untuk memindahkan pangsapuri tersebut kepada plaintif; dan (c) untuk perisytiharaan bahawa defendan pertama memegang pangsapuri tersebut sebagai pemegang amanah untuk manfaat plaintif. Plaintif juga menuntut terhadap defendan kedua untuk, antara lain, bahawa (a) defendan kedua, pekerja-pekerjanya dan agen-agennya menyerahkan milikan pangsapuri tersebut kepada plaintif; (b) gantirugi kerana memecah masuk ke dalam pangsapuri tersebut akan ditaksirkan; dan (c) faedah, kos dan relief-relief lain yang mungkin adil dan saksama. Fakta-fakta yang membawa kepada pemfailan guaman ini berpunca daripada pergaduhan antara plaintif dan defendan, ke atas sebuah pangsapuri dikenali sebagai No: A1, Desaria Apartment, Taman Gembira, Jalan Mesraria, Kuala Lumpur (selepas ini dirujuk sebagai 'pangsapuri'). Plaintif mengatakan bahawa dalam tahun 1987, mendiang ayah plaintif telah memberikan pangsapuri kepada plaintif. Plaintif kemudiannya mengambil milikan pangsapuri dalam awal tahun 1988 dan pengubahsuaian pangsapuri telah dijalankan secara besar-besaran. Kemudiannya, dalam bulan Mei 1988, plaintif telah berpindah ke dalam pangsapuri dengan keluarganya. Selepas itu, semasa makan malam perjumpaan semula keluarga pada Tahun Baru Cina dalam tahun 1989, mendiang En Chua Khay Leong (mendiang ayah plaintif) mengisytiharkan kepada ahli-ahli keluarga yang berkumpul ketika itu tentang niatnya untuk memberikan pangsapuri kepada plaintif sebagai hadiah. Kesemua adik-beradik lelaki mendiang En Chua Khay Leong yang juga merupakan pengarah-pengarah dan pemegang-pemegang saham dalam keluarga defendan pertama hadir ketika perjumpaan dan telah bersetuju dan memberikan kebenaran bahawa pangsapuri akan diberikan kepada plaintif sebagai hadiah. Pangsapuri yang merupakan perkara subjek dalam pertikaian ini, telah dibina di atas sebidang tanah yang mana mendiang ayah plaintif telah membelinya atas nama isteri keduanya dan dua orang anak lelaki dengan isteri pertama. Tanah kemudiannya ditukar namanya kepada syarikat defendan pertama. Atas perintah mendiang ayah plaintif, defendan kedua telah menyediakan surat akujanji bertarikh 18 Mei 1990 yang perlu ditandatangani oleh kesemua pengarah syarikat defendan pertama untuk melaksanakan pindahmilik pangsapuri kepada plaintif selepas pengeluaran

hakmilik strata. Menurut plaintif, mendiang ayahnya telah menyerahkan kepadanya surat akujanji bertarikh 18 Mei 1990 yang telahpun ditandatangani oleh abang sulung, Chua Seow Guan dan adik lelaki bongsu (defendan kedua). Plaintif kemudiannya menyerahkan surat akujanji kepada abang yang lain, Chua Thiam Kin untuk ditandatangani. Selepas kematian mendiang ayah plaintif dalam tahun 1992, defendan kedua kemudiannya mengawal kesemua empayar perniagaan yang ditinggalkan oleh mendiang ayahnya.

Plaintif juga menyatakan bahawa oleh kerana pertolongan yang diberikan kepada Chua Ching Siew (kakak plaintif) telah menjengkelkan defendan kedua dan ini membuatkannya berpaling daripada plaintif. Ia telah dihujahkan untuk plaintif bahawa defendan kedua telah mengatakan dan membuat cerita bahawa plaintif adalah seorang penyewa syarikat defendan pertama dan bahawa plaintif telah tertunggak sewanya untuk kesemua tahun-tahun semasa menduduki pangsapuri yang menjadi persoalan. Plaintif menyedari kepentingan surat akujanji asal yang masih belum dikembalikan kepadanya oleh salah seorang abangnya yang bernama Chua Thiam Kin yang mana beliau telah menyerahkan surat akujanji asal yang juga telah memaklumkan kepadanya bahawa beliau telah tersalah letak. Plaintif kemudiannya mengeluarkan salinan surat akujanji dalam milikannya meminta abangnya bernama Chua Thiam Kin dan seorang abang yang lain bernama Chua Thiam Siew yang merupakan pengarah-pengarah dan pemegang-pemegang saham syarikat defendan pertama untuk menandatangani surat akujanji. Terdapat keterangan menunjukkan bahawa defendan kedua telah memecah masuk ke dalam pangsapuri plaintif semasa beliau berada di Singapura dan telah menukar kunci pangsapuri dan telah menghalang akses ke dalam pangsapuri. Berdepan dengan kesusahan ini, plaintif tidak ada pilihan selain memfailkan tindakan ini terhadap syarikat defendan pertama berserta defendan kedua yang telah secara paksa mengambil milikan pangsapuri tersebut dan tidak membenarkan plaintif memiliki dan mendudukinya.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif telah menyimpan kesemua invois barang dan bahan yang telah dipesan semenjak dari tahun 1988 untuk tujuan pengubahsuaian pangsapuri tersebut untuk kos keseluruhan sebanyak RM50,000. Bukan hanya beliau mempunyai invois-invois, beliau juga menyimpan gambar-gambar dan negatif-negatif untuk pengubahsuaian khusus yang dilakukan kepada pangsapuri tersebut. Kalau hendak dikatakan, invois-invois dan gambar-gambar itu sudah tentu berguna untuk mengesahkan tuntutannya bahawa pengubahsuaian telah dijalankan ke atas pangsapuri tersebut. Sesuatu dokumen, sama ada ia adalah manuskrip kulit atau sehelai kertas dan sama ada ia telah berkedut atau

koyak, ia merupakan, jika dikemukakan, akan menjadi keterangan sebenar. [*R v Rice* [1963] 1 QB 85] (lihat perenggan (lihat perenggan 16).

(2) Pernyataan saksi adalah kenyataan bertulis saksi melalui afidavit dan ia akan diterima sebagai pemeriksaan utama. Ia mengandungi keterangan saksi. Dengan memberikan pernyataan saksi kepada pihak lain yang dirangka untuk menggalakkan pelupusan prosiding secara adil dan juga menjimatkan masa. Pernyataan saksi akan mengenal pasti isu-isu sebenar dan menggalakkan pihak-pihak untuk membuat pengakuan fakta yang berpatutan. Ia menjauhkan elemen yang memeranjatkan dan ia memberikan pihak yang memeriksa balas kelebihan untuk mengetahui terlebih dahulu apa yang akan dikatakan saksi dalam pemeriksaan utamanya. Dengan memberikan keterangan utama melalui afidavit, saksi menggunakan perkataannya sendiri dan pernyataan dibuat daripada pengetahuan saksi sendiri. Ringkasnya, pernyataan saksi adalah bersamaan dengan keterangan lisan yang saksi akan, jika dipanggil untuk memberikan keterangan, diberikan dalam keterangan (lihat perenggan 35).

(3) Dalam pembelaan terpinda, defendan-defendan telah memplidkan mereka tidak mempunyai pengetahuan mengenai kewujudan surat akujanji dan secara alternatifnya defendan-defendan menyatakan bahawa jika terdapat surat akujanji, yang mana dinafikan, surat akujanji itu telah ditandatangani oleh dua pengarah kepada defendan pertama. Tetapi, dalam pemeriksaan balas, defendan kedua mengaku bahawa beliau telah meminta mendiang ayahnya agar surat akujanji ditandatangani oleh kesemua pengarah dan pemegang saham defendan pertama. Defendan kedua kemudiannya mengaku bahawa beliau telah menyediakan surat tidak bertarikh dan beliau telah menyerahkan surat tersebut berserta dengan surat akujanji kepada mendiang ayahnya. Keterangan ini sudah tentu adalah konsisten dengan keterangan plaintif dimana plaintif telah menyatakan bahawa surat akujanji asal dan salinannya bersama dengan surat tidak bertarikh telah diberikan kepadanya oleh mendiang ayahnya. Jadi, ia boleh diagak bahawa pengakuan defendan kedua bahawa beliau tidak mempunyai pengetahuan mengenai surat akujanji dalam pembelaan terpinda dan penafian kewujudan surat akujanji oleh itu adalah salah dan tidak benar (lihat perenggan 41).

(4) Defendan kedua tahu dengan mendalam bahawa terdapat surat akujanji asal serta salinan yang asalnya telahpun ditandatangani oleh defendan kedua, Chua Thiam Kin (SP3) (lihat perenggan 46).

(5) Defendan kedua adalah tidak jujur dan telah menipu mahkamah apabila beliau memberikan keterangan bahawa defendan pertama telah membuat resolusi dalam mesyuarat pengarah yang telah diadakan pada

5 Februari 1997 yang mana ia akan mendapatkan milikan pangsapuri dan resolusi telah dipinda oleh pengarah-pengarah defendan pertama dalam Mesyuarat Agung Tahunan yang telah diadakan pada 23 Jun 1997 (lihat perenggan 47).

(6) Plaintif memberikan keterangan bahawa beliau telah menduduki secara berterusan pangsapuri sehingga beliau mengikuti suaminya ke Singapura dalam bulan April 1991. Plaintif kemudiannya menyambung dan telah mengemukakan keterangan bagi menunjukkan bahawa beliau memiliki pangsapuri sehingga defendan kedua memecah masuk ke dalam pangsapurinya pada 14 Ogos 1986. Keterangannya adalah dalam bentuk bil-bil elektrik dan air yang telah dikeluarkan oleh pihak-pihak berkuasa dalam tahun 1996 dan bil-bil yang telah dijelaskan dalam tahun 1996. Kesemua ini menunjukkan bahawa defendan kedua telah menambah cerita bahawa plaintif telah meninggalkan pangsapuri pada tahun 1991 (lihat perenggan 48–50).

(7) Plaintif telah berjaya mengemukakan bahawa kepentingan perundangan beliau telah terjejas. Dalam jawapan terpinda kepada pembelaan defendan, plaintif memplidkan bahawa beliau adalah pemilik warisan pangsapuri dan defendan pertama memegang pangsapuri sebagai amanah untuk plaintif. Dan pada perenggan 11 jawapan terpinda plaintif dan pembelaan kepada tuntutan balas, plaintif memplidkan bahawa tuntutannya adalah, antara lain, berdasarkan kontrak, amanah, pencerobohan dan estopel. Plaintif telah memplidkan kesnya dengan ringkas. Pliding-pliding telah dirangka secara profesional dan ia mengambarkan inti pati dan mendalamnya tuntutan (lihat perenggan 55).

(8) Memandangkan fakta bahawa defendan kedua adalah hanya pengarah dan pemegang saham defendan pertama yang selepas itu telah bersetuju dan melaksanakan surat akujanji bertarikh 18 Mei 1990 menafikan plaintif haknya dan kelayakannya kepada pangsapuri tersebut dan telah secara sendirinya dan melanggar amanah akujanji telah menjual pengsapuri kepada pihak ketiga, satu perintah mesti dibuat terhadap defendan-defendan untuk ganti rugi yang ditanggung oleh plaintif ditaksirkan oleh penolong kanan pendaftar (lihat perenggan 50).

(9) Jumlah yang diawardkan untuk perlanggaran kontrak atau, seperti terjadi disini, untuk perlanggaran akujanji memberikan pangsapuri kepada plaintif akan dikira bagi mempampas pihak yang cedera untuk mendapatkan kembali sebarang keuntungan yang dibuat oleh pihak dalam perlanggaran. Plaintif juga layak diberikan gantirugi teladan untuk kelakuan defendan kedua yang menjual pangsapuri kepada pihak ketiga bila perbicaraan sedang berjalan dan dengan itu menghalang plaintif dari mendapatkan remedi perlaksanaan spesifik (lihat perenggan 58).

Notes

For cases on witness, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7902–7910.

For cases on breach, see 3(1)*Mallal's Digest* (4th Ed, 2006 Reissue) paras 3248–3257.

Cases referred to

Au Yong Kun Min v Tractors Malaysia Bhd [1997] 5 MLJ 168 (refd)
Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22 (refd)
Attorney General v Blake [2000] 4 All ER 385 (refd)
Bee Wah Plastic Factory Sdn Bhd v Francis Soh Kai Shuen B/S Shatin Marketing & General Agencies [1997] 4 MLJ 545 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)
Dato Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (refd)
Datuk Syed Kechik bin Syed Mohamed v The Government of Malaysia and Sabah [1979] 2 MLJ 101 (refd)
Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Ptd Ltd [1994] 1 MLJ 553 (refd)
Emko Properties Sdn Bhd v Lee Choong Kheng [1997] 2 CLJ Supp 133 (refd)
Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan (Rahaz Sdn Bhd & Anor – Interveners) & Anor Application [2001] 1 AMR 875 (refd)
Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)
Harmony Shipping Co SA v Saudi Europe Line Ltd [1979] 1 WLR 1380 (refd)
Karintina Trading Pte Ltd v Cornelder's (Sabah) Sdn Bhd [1995] 2 CLJ 604 (refd)
Lim Cho Hock v Speaker, Perak Legislative Assembly [1979] 2 MLJ 85 (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Mechanical & General Inventions Co Ltd v Austin [1935] AC 346 (refd)
Ng Lay Choo Marion v Lok Lai Oi [1995] 3 SLR 221 (refd)
Petaling Tin Bhd v Lee Kian Chan [1994] 1 MLJ 657 (refd)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
R v Kalia [1975] Crim LR 181 (refd)
R v Rice [1963] 1 QB 857 (refd)
R v Roncoli [1998] Crim LR 584 (refd)
R v Sharp [1993] 3 All ER 225 (refd)
Rosita bte Baharom & Anor v Sabedin bin Salleh [1992] 1 MLJ 379 (refd)
Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd [1997] 5 MLJ 121 (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)
Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)

A *Wai Wing Properties Pte Ltd v Ganesh & Liu (sued as a firm)* [1994] 3 SLR 101 (refd)

Legislation referred to

Contracts Act 1950 s 26

B Rules of the High Court 1980 O 15 r 16, O 35A r 1

Specific Relief Act 1950 s 41

K Sinniah (Syed Alwi, Ng & Co) for the plaintiff.

Mark Ho Hing Kheong (Chellam Wong) for the defendant.

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Abdul Malik Ishak J (now JCA):

[1] This was a case of a squabble between family members, to be precise, D between a sister ('the plaintiff') and a brother ('the second defendant') over one unit of an apartment known as No A1, Desaria Apartment, Taman Gembira, Jalan Mesraria, Kuala Lumpur ('the apartment') upon the death of their father by the name of Mr Chua Khay Leong — the patriarch of the family in 1992. That apartment was registered in the name of the first E defendant. The plaintiff, as the aggrieved sister, sought for the following reliefs against the first defendant:

(a) that the first defendant, its servants and agents deliver possession of the said apartment to the plaintiff;

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(b) that an order for the specific performance of the undertaking dated 18 May 1990 or alternatively for an order for specific performance pursuant to the consent/agreement of all the shareholders of the first defendant's company to transfer the said apartment to the plaintiff;

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(c) for a declaration that the first defendant is holding the said apartment as a trustee for the benefit of the plaintiff;

(d) further, in addition thereto and as an alternative to specific performance, for:

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(i) the market value of the said apartment to be assessed;

(ii) damages as a consequence for the breaking into of the said apartment;

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(iii) costs of the renovation to the said apartment and other expenditure at RM50,000.00;

(iv) interest and solicitor's costs; and

(v) such further and other reliefs as may be just and equitable.

The plaintiff too claimed against the second defendant, the brother for the following reliefs:

(a) that the second defendant, its servants and agents deliver possession of the said apartment to the plaintiff;

(b) that damages for the breaking into of the said apartment to be assessed; and

(c) interest, costs and other reliefs as may be just and equitable.

FACTUAL MATRIX

[2] The plaintiff who was residing in Singapore made a decision to come back to Malaysia in 1988. Her late father had discussed with her in the later part of 1987 about giving her the apartment as a gift. That discussion also centred on the willingness of her late father to give each of his daughters an apartment from the 24 units of apartments built on a piece of land registered in the family owned by the first defendant's company by the name of Land Development Specialist Sdn Bhd. In 1987, her late father gave the plaintiff the apartment. The plaintiff took possession of the apartment in early 1988 and she renovated the apartment extensively. She moved into the apartment in the month of May 1988 with her family.

[3] At a Chinese New Year family reunion dinner in 1989, the late Mr Chua Khay Leong declared to the family members gathered there of his intention to give the apartment to the plaintiff as a gift. All the male siblings of the late Mr Chua Khay Leong who were also the directors and shareholders in the family's first defendants company were present at the said gathering and they all agreed and consented that the apartment be given to the plaintiff as a gift.

[4] The plaintiff's husband by the name of Loo Yew Kee @ Loh Yew Kee was a partner in the firm of architects that had designed the 24 units of apartments that were built on the piece of land that the plaintiff's late father had purchased in the name of his second wife and his two sons by the first wife. The land was subsequently transferred into the name of the first defendant's company. At the behest of the plaintiff's late father, the second defendant by the name of Chua Thiam Singh prepared a letter of undertaking dated 18 May 1990 to be signed by all the directors of the first defendant's company to effect the transfer of the apartment to the plaintiff upon issuance of the strata title. According to the plaintiff, her late father handed over to her the letter of undertaking dated 18 May 1990 which had already been signed by her eldest brother by the name of Chua Seow Guan and her youngest brother by the name of Chua Thiam Singh, the second defendant. The

plaintiff then handed the letter of undertaking to her other brother by the name of Chua Thiam Kin for him to sign and he agreed to sign it later and would return it to her in due course.

[5] At around the time when the plaintiff moved into the apartment that was allotted to her which was in 1988, two of the plaintiff's other brothers were also occupying various other units in the same building. During this time too the plaintiff was employed by Fortuna Hotel, one of the many assets and properties amassed by the late father. Everything went well and it was indeed one big happy family until the late father died in 1992. The second defendant then took control of almost the entire business empire left by the late father.

[6] Despite the wealth and assets that had come into his hands and having the control and power over almost the entire wealth, concerns and the assets of the family vast businesses, it was said that the second defendant defrauded his sister by the name of Chua Ching Siew who resided in the United States of America of her assets in the family concerns. It seemed that the plaintiff, at the request of Chua Ching Siew, had assisted her to engage solicitors in Malaysia to sue the second defendant. The plaintiff's sister by the name of Chua Ching Siew had filed two civil suits against the second defendant in the High Court of Kuala Lumpur in 1992 and in 1996. It was because of the assistance that the plaintiff rendered to Chua Ching Siew that irked the second defendant and had made him turn against the plaintiff. It was submitted that the second defendant had alleged and framed a story to the effect that the plaintiff was a tenant of the first defendant's company and that the plaintiff was in arrears of rentals for all the years she was in occupation of the apartment in question.

[7] The plaintiff realised the significance of the original letter of undertaking that had not been returned to her by one of her brothers by the name of Chua Thiam Kin to whom she had handed the original letter of undertaking and who had informed her that he had misplaced it. The plaintiff then took out the copy of the letter of undertaking that was in her possession and asked her brother by the name of Chua Thiam Kin and another brother by the name of Chua Thiam Siew who were and are the directors and shareholders of the first defendant's company to sign the letter of undertaking.

[8] There was evidence to show that the second defendant had broken into the plaintiff's apartment while she was away in Singapore and had changed the lock to the apartment and had kept her completely out of the apartment. Faced with this predicament, the plaintiff had no choice but to file this action against the first defendant's company as well as the second defendant who had

forcibly taken possession of the said apartment and had deprived the plaintiff of the possession and occupation of the same. During the trial, it was revealed that the second defendant had permanently deprived the plaintiff of the said apartment by selling the same to a third party. It was submitted that the high handed attitude of the second defendant, his greed, his vengeance, the extent and length that the second defendant would use his influence and means against his weaker siblings to achieve his ends, namely, to deprive the plaintiff of what was rightfully hers that was given to her by her late father have been demonstrated in this trial.

ANALYSIS

[9] The plaintiff took the stand and she called two witnesses to support her case, namely, her husband by the name of Loo Yew Kee @ Loh Yew Kee (SP2) and her brother by the name of Chua Thiam Kin (SP3). I will now examine their evidence in quick succession under the following sub-heads:

(a) The plaintiff's testimony in court

[10] I was asked to ascertain her demeanour and I must make these observations. She was honest and truthful and she did not waiver when cross-examined by the defendants' counsel. Her evidence was one of consistency and her testimony was not discredited at any time. Her demeanour gave credence to her credibility.

[11] The plaintiff had kept all the invoices of the items and materials that she had ordered way back in 1988 in order to renovate the said apartment at the total costs of RM50,000. Little did she realise how useful the invoices would be to her in the later part of her life when she has to substantiate her claim in a court of law. Not only did she have the invoices, she also kept the photographs and negatives of the specific renovations done to the said apartment. To say the least, those invoices and photographs were indeed useful to substantiate her claim that renovation works had been done to the said apartment. I venture to say that a document, whether it is a parchment or a piece of paper and whether it is crumpled or torn, it constitutes, once produced, a piece of real evidence (*R v Rice* [1963] 1 QB 857

[12] The plaintiff, in her examination-in-chief, related that her late father founded the first defendant's company. And that the first defendant's company, being a family company, had her late father as the director together with her four brothers as directors. She stated that her four brothers were also the shareholders of the first defendant's company. The oral agreement to transfer the apartment to the plaintiff as a gift that was raised and repeated by the plaintiff's late father at the Chinese New Year family reunion dinner

in 1989 was subsequently reduced into writing in the form of an undertaking. In fact, in 1987, the plaintiff's late father gave the plaintiff the apartment. The second defendant prepared the undertaking dated 18 May 1990 which provided, inter alia, that at the request of the plaintiff's late father, the plaintiff's brothers who were the directors of the first defendant's company had agreed to transfer the said apartment to the plaintiff upon issuance of the strata title. According to the plaintiff, her late father handed to her the original and a copy of the undertaking dated 18 May 1990. The undertaking that was handed over to her by her late father carried the signatures of her eldest brother by the name of Chua Seow Guan and the second defendant. The plaintiff handed the original copy of the undertaking that carried the signatures of Chua Seow Guan and the second defendant to another brother by the name of Chua Thiam Kin who agreed to sign and return the same to her. In the course of the trial, the plaintiff produced the copy of the undertaking which she had retained and it was duly marked as exh P58. It was worded in this way (see p 61 of the plaintiff's bundle of documents marked as 'B'):

UNDERTAKING

This UNDERTAKING is given by Land Development Specialist Sdn Bhd, a private limited company incorporated in Malaysia under registration No. 2276/78 and having its registered office at 805, 8th floor, Magnum Plaza, Jalan Pudu, Kuala Lumpur (hereinafter referred to as 'LDS').

LDS is the registered owner of 24 units of apartments commonly known as Desaria Apartment situated on Lot 27680 held under GM 1040 Mukim of Petaling, Kuala Lumpur. These apartments are presently held under one Master Title however application have already been submitted to the relevant Land Office for the sub-division of the Master title into 24 Subsidiary or Strata Titles whereupon each apartment will have its own separate title. To-date the relevant Land Office have yet to issue the individual titles.

At the request of Mr Chua Khay Leong (NRIC No. 2995171) who is the founding member of the LDS, the Directors of LDS who are all sons of the abovenamed hereby agree to transfer one (1) unit of the apartment designed as Unit A1 (refer to attached plan) to Chua Cheng Wan *(NRIC no. 3306252)* who is the daughter of Mr Chua Khay Leong and sister to the directors of LDS. THIS UNDERTAKING is hereby given by the Directors of LDS that they will commit the Company to transfer apartment No. Unit A1 to CHUA CHENG WAN upon the issue of the Strata Titles by the relevant Land Office. The Directors of LDS further confirm that the transfer shall be free of any monetary consideration.

However, it is hereby expressly stated that the transferee shall confirm to the provisions and stipulation of the Management Corporation which will be set up to manage the Apartment immediately upon the issue of the Strata Titles in accordance to the Strata Titles Act.

BOARD OF DIRECTORS	Signed Illegible
.....	.....
Chua Seow Guan	Chua Thiam Kin
.....	
Chua Thiam Siew	Signed Illegible
Dated: 18 May 1990	.....
Kuala Lumpur	Chua Thiam Singh

[13] According to the plaintiff, the letter of undertaking was prepared by the second defendant because it contained detailed references to certain matters like the company's registration number, the registered office of the first defendant's company, the reference to the title of the property and that the application had been made to the land office for the issuance of the strata title. The plaintiff recognised the handwriting of the second defendant and she categorically stated that the second defendant was the one who had written down her identity card number in the letter of undertaking on both the original letter of undertaking as well as the copy. The plaintiff testified that together with the undertaking her late father also gave her an undated letter, an original and a copy. She signed the original and returned it to her late father and she kept the copy of the said letter. She produced the copy of the letter in court in the course of the trial and it was marked as exh P59. It was worded in this way (see p 26 of bundle 'C2'):

The Directors

Land Development Specialists Sdn Bhd

87 Jalan Berangan

50200 Kuala Lumpur

Dear Sirs,

RE: DESARIA APARTMENT UNIT A1

LOT 27680, GM 1040, MUKIM PETALING, KUALA LUMPUR

Thank you for your Undertaking dated 18 May 1990.

As discussed and mutually agreed, I am pleased to confirm the following Undertakings on my part:

(1) I will not dispose off the apartment Unit A1 without the written consent from your Board of Directors.

(2) In the event your Company decides to sell the entire apartment block, I hereby agree that I will also sell unit A1 and I will not object to the sale.

(3) As long as I receive 1/24 share of the total sale proceed, I will sell unit A1 and shall not have any say over the total selling price of the whole apartment block.

(4) I hereby agree to adhere to and observe the provisions and stipulations of the Management Corporation and pay whatever charges due.

Thank you.

Yours faithfully,

Sgd. (Illegible)

.....

CHUA CHENG WAN

(NRIC NO: 3306252)

Witnessed:

[14] The plaintiff informed the court that she took possession of the apartment in question in 1988 and renovated the apartment for RM50,000 and occupied the apartment until she followed her husband to Singapore in April 1991. The plaintiff also informed the court that she had worked in Fortuna Hotel, another of her family's concern, until April 1991 and she then referred to the EPF statement, a copy of which can be seen at pp 1 and 2 of bundle 'C2' which was marked as exh P61.

[15] The plaintiff testified that she retained possession of the said apartment although she was in Singapore and that she and her family would occupy the same whenever she came down to Kuala Lumpur. She produced the electricity and water bills to prove that she was in possession of the apartment until 1996. Copies of the electricity and water bills that were produced by the plaintiff can be seen at pp 3–14 and at pp 15–25 respectively of bundle 'C2' and they were marked as exhs P62 and P63. According to the plaintiff, her late father besides being in control of the 24 units of apartments at Taman Gembira, Jalan Mesraria, Kuala Lumpur, also possessed and had control and interest in the following assets and properties:

(a) the Chin Guan Tannery;

(b) the Seng Hong Tannery;

(c) the Fortuna Hotel and its annex;

(d) Chua Khay Leong & Sons Sdn Bhd., a company involved in the construction and letting out of properties;

(e) Land Development Specialist Sdn Bhd (the first defendant), a company involved in the construction of apartments which were offered for sale as well as for rent;

(f) the family bungalow at No: 37, Changkat Desa, Taman Dewa, old Klang road;

(g) a piece of land in Kajang;

(h) a piece of land in Malacca;

(i) a house in Jalan Palmer;

(j) a piece of land in Cheras;

(k) a house at Jalan Bendera, off Jalan Imbi;

(l) 8 pieces of land titles in Province Wellesley, Penang;

(m) one unit of flat at Jalan Imbi; and

(n) a piece of land at Jalan Chan Sow Lin

[16] The plaintiff testified further and she said that her brother by the name of Chua Seow Guan died in late 1990 and his son Chua Hun Hoon was made a director on 5 December 1990. According to her, upon the death of her late father in 1992, the second defendant (the youngest brother) took charge and controlled the family assets and concerns and that her other brothers by the names of Chua Thiam Kin and Chua Thiam Siew also wielded some powers but to a lesser extent. According to the plaintiff, her relationship with the second defendant was alright but after the death of her late father, the second defendant became upset and annoyed with her. This was because the plaintiff had assisted her sister, who was residing in the United States of America and upon her sister's request, to engage solicitors in Kuala Lumpur to file a civil suit against the second defendant personally in the High Court of Kuala Lumpur vide Civil Suit No S2–22–434–92, a copy of which was marked as exh P64. According to the plaintiff when the second defendant came to know about the whole episode he proceeded to instruct his solicitors Messrs Raja & Lau to send a letter of demand to the plaintiff demanding arrears of rentals totalling RM78,000 inclusive of vacant possession. The plaintiff produced a copy of that letter than can be found at pp 27 to 28 of bundle 'C' and it was marked as exh P65. The plaintiff swiftly acted and she instructed her solicitors to deny the second defendant's allegations and her solicitors did just that. A copy of the plaintiff's solicitors letter was produced by the plaintiff and it can be seen at p 65 of bundle 'B' and it was marked as exh P69. The plaintiff again testified that her sister who resided in the United States of America again sought her assistance to file a claim against the second defendant personally as well as against the second defendant's company and also against Chua Khay Leong & Sons Sdn Bhd vide Civil Suit No D2–22–142–96. What the plaintiff did further angered the second defendant. A copy of the writ can be seen at pp 47–61 of bundle 'C2' which was marked as exh P67. According to the plaintiff, the second defendant expressed his intention of taking possession of the plaintiff's

apartment through the first defendant by way of a letter dated 30 July 1996 and that letter was worded as follows:

LAND DEVELOPMENT SPECIALIST SDN BHD

30 July 1996

Mr & Mrs Loh Yew Kee

151 Cavenagh Road #08-153

Singapore 0923 A. R. REGISTERED

PREMISES KNOWN AS UNIT A1, DESARIA APARTMENTS, TAMAN GEMBIRA, JALAN JIRAN, KUALA LUMPUR

We refer to the above apartment unit which you have failed to pay rent and refused to surrender same to our Company despite having vacated the premises sometime in 1990.

We now inform you that you have 14 days from the date hereof to remove all your movable and personal items from the above premises, failing which, our agent will on 14 August 1996 break the lock and enter the said premises to regain possession of same for our Company. Our agent will not be accountable for any items that may have been left in the premises by you.

We further inform that you are to remove a broken down vehicle (Ford Granada) which you have left on the car park designated for use for the tenant/occupant of Apartment Unit A1. We will arrange to have the said vehicle towed away and disposed off as junk on 14 August 1996.

Yours faithfully

LAND DEVELOPMENT SPECIALIST SDN BHD

Signed (Illegible)

.....

Authorised Signatory

cc Rajah Lau & Associates

Attn: Mr Eng Kaa Chee

And the plaintiff instructed her solicitors to reply accordingly and denied the allegations thereto and the reply can be seen in exh P69.

[17] It was thus not a surprise when the second defendant broke into the plaintiff's apartment on 14 August 1996 and took possession forthwith. The plaintiff's solicitors then wrote a letter to the defendant's solicitors and complained about the unlawful break-in of the plaintiff's apartment by the second defendant.

[18] The plaintiff realised that her brother by the name of Chua Thiam Kin had not returned the original letter of undertaking to her and acting prudently she took the copy of the letter of undertaking that was in her possession as per exh P58 and swiftly obtained the signatures of her brothers Chua Thiam Kin and Chua Thiam Siew. It transpired that her brother Chua Thiam Siew had mistakenly signed the copy of the letter of undertaking above the name of the second defendant.

[19] The plaintiff testified that her other brothers did not deny that the apartment was given to her as a gift and they were surprised that the second defendant was denying her right to the said apartment. She categorically said that both her brothers signed the copy of the letter of undertaking willingly. She further testified that her brother by the name of Chua Thiam Kin had affirmed a statutory declaration dated 20 July 1999 to the effect that the apartment was given as a gift to the plaintiff. The statutory declaration of Chua Thiam Kin was produced by the plaintiff and it can be seen at p 107 of bundle 'B' and it was marked as exh P71.

[20] Both the plaintiff's sisters known as Chua Cheng Yow and Chua Ching Siew who resided in the United States of America also affirmed statutory declarations to the effect that the apartment was given to the plaintiff as a gift. Their statutory declarations can be seen at pp 100 and 101 of bundle 'B' and they were marked as exhs P72 and P73. The plaintiff reiterated that the second defendant now had full control of the assets left by her late father with minimal powers extended to her other brothers Chua Thiam Siew and Chua Thiam Kin. The plaintiff also testified that Chua Thiam Siew has since left Malaysia and is now residing in the United States of America.

THE CROSS-EXAMINATION OF THE PLAINTIFF

[21] It was submitted that the plaintiff did not, at any time waiver under cross-examination and that her answers to the questions raised by counsel for both the defendants had strengthened her case. I took note of this salient submission. Cross-examination may be defined as the questioning of a witness immediately after his examination-in-chief and it will be done by the opponent of the party calling him or by any party to the proceedings. And the trial judge is entitled to intervene in the course of cross-examination (*R v Sharp* [1993] 3 All ER 225, and *R v Roncoli* [1998] Crim LR 584). All witnesses who are sworn are liable to be cross-examined. A witness under cross-examination may be asked leading questions (*Parkin v Moon* (1836) 7 C & P 408). The trial judge controls the progress of the cross-examination and will prevent questions which are unnecessary, improper or oppressive. Counsel will be restrained from embarking on lengthy cross-examination on

matters that are not really in issue (*R v Kalia* [1975] Crim LR 181, and *Mechanical & General Inventions Co Ltd v Austin* [1935] AC 346 at p 359). Fortunately for me, counsel on both sides knew the limits of cross-examining the opponent's witnesses.

[22] The plaintiff testified that all her brothers had no means of purchasing the land on which the 24 units of apartments stood and that whatever assets they had, came from the late father. According to the plaintiff, the second defendant had studied abroad and when he returned from his studies he was only 28 years of age and he was certainly not in a position to buy any property. The plaintiff told the court that her late father had actually told her that he had purchased the land on which the 24 units of apartment stood in the name of her step mother and her two brothers and that the said land was subsequently transferred into the name of the first defendant's company 'and from there my late father made all his four sons, namely, Chua Seow Guan (deceased), Chua Thiam Kin, Chua Thiam Siew and the second defendant as the directors and shareholders of the first defendant. Each of them had equal shares 25% in the first defendant's company' (see p 53 of the notes of evidence).

[23] Under cross-examination, the plaintiff testified that the directors have stated in the undertaking that it is a family concern company and that on the order of her late father, the founder member, the sons will obey their father and will transfer the apartment to her. According to the plaintiff, she did not sue her other brothers personally because they did not break into her apartment and they did not know of the action taken by the second defendant. Again, under cross-examination, the plaintiff testified that the second defendant signed the undertaking in 1990 and at that time she did not have any problems with him until she helped her sister who was in the United States of America to file two suits against the second defendant in the High Court of Kuala Lumpur.

[24] The plaintiff gave a very apt answer to the defendants' counsel question as to why she did not make a copy of the original letter of undertaking which carried the signatures of the deceased older brother by the name of Chua Seow Guan and that of the second defendant. Although the plaintiff agreed that the original letter of undertaking was very important to her, yet she explained that it was a family arrangement and that she 'never thought that he would turn around and be nasty to me' (see p 57 of the notes of evidence). The plaintiff went on to say under cross-examination that (see pp 57–58 of the notes of evidence):

> On that day when my late father handed me the original plus the copy of the undertaking that was not signed, it did not occur to me that it would be so important. If I had known that it would come to this, I would definitely had taken

a photocopy. At that moment it was not important to me then, I believed my father; I trusted them and or that very day I remember it was at the office of the tannery. At that moment when he handed me the 2 undertakings my other brother Chua Thiam Kin walked into the office since my late father and I were talking and I just handed him the original undertaking and I asked him to sign. He told me that he will sign it and he took it and he then left and he said that he would give back to me. I kept the copy of the letter. Chua Thiam Kin misplaced the original letter of undertaking. He is in KL and I will be calling him. I handed the original letter of undertaking to Chua Thiam Kin the same day that my father passed it to me.

[25] The plaintiff only discovered that the original letter of undertaking was missing 'after the second defendant sent me the letter dated 15 June 1994 demanding rental of RM78,000 for this A1 Desaria Apartment' (see p 59 of the notes of evidence). The plaintiff continued in serious vein when she testified as follows (see pp 59 60 of the notes of evidence):

When I handed the original letter of undertaking to Chua Thiam Kin on that day, I just forgot about the whole thing and I just let it be. After that in April 1991, I moved to Singapore and it was not important to obtain the original letter of undertaking from Chua Thiam Kin until the first defendant through their lawyers Rajah Lau & Associates (P65) sent (P65) to me and my husband in Singapore stating that I was a tenant of the apartment and demanded rental of RM78,000. These are all lies created by the second defendant. I was never a tenant of the said apartment since that apartment had been mine and I have been residing there since May 1988 and all these years from 1988 till 15 June 1994 I had no trouble with him until I helped my sister to file a suit against the second defendant. Then, I thought that I better had some proof and I asked Chua Thiam Kin for the undertaking and he told me that he could not find the original letter of undertaking and that he had misplaced it.

[26] Again, under cross-examination, the plaintiff went further to explain (see pp 60– 61 of the notes of evidence):

On that copy you can see the second defendant's original handwriting writing my I/C number on the blank copy. He wrote my I/C number on the original copy as well as the blank copy. At bundle 'B' p 109, the second defendant wrote down my I/C number ie 3306252.

[27] In answer to a question as to why there was a signature above Chua Thiam Singh's name in the copy of the undertaking, the plaintiff explained it in this way (see pp 61–62 of the notes of evidence):

After I received the nasty letter from the second defendant demanding rental, I thought I better had some proof to have the letter of undertaking signed and so he signed willingly the letter of undertaking as per p 109 of bundle 'B'. I saw him signing. After signing, Chua Thiam Kin handed back to me there and then. I can't remember when was it.

> I later handed the same copy for Chua Thiam Siew to sign and he signed the letter of undertaking after the commencement of the suit. I personally saw Chua Thiam Siew sign on the blank copy and he then returned it to me. This was done after the commencement of this suit and before he migrated to the United States. So I think it must be sometime in 1997.
>
> Chua Thiam Siew was not staying at Petaling Jaya and at that time he was staying in Bukit Tunku. I went to his apartment and he signed for me willingly and he then gave to me there and then. I personally saw Chua Thiam Siew signing the blank letter of undertaking and at that time, I did not notice that he had signed on the wrong column and neither was he aware of it. We were having conversation. We were having tea and all that. I noticed this error when I wanted to fax it to my lawyer and only then I realised it was signed at the wrong place meaning Chua Thiam Siew had signed at the wrong column. I pointed out to my lawyer then George Chong that Chua Thiam Siew had signed above the wrong name

[28] Of pertinence was this, that the plaintiff informed the court under cross-examination that both Chua Thiam Kin and Chua Thiam Siew did not authorise the breaking into of the plaintiff's apartment and that the decision was taken by the second defendant only. When shown the letter of demand issued by the first defendant which can be seen at p 29 of bundle 'C2', this was what the plaintiff said (see p 67 of the notes of evidence):

> This letter came from the first defendant's company but I know it is written by the second defendant because when I asked my other two brothers, Chua Thiam Kin and Chua Thiam Siew they have no knowledge of this letter. So this letter came from the second defendant, he acted on his own authority.

Later, still under cross-examination, the plaintiff said this (see p 70 of the notes of evidence):

> Chua Thiam Kin being a director of the first defendant's company did not authorise the first defendant's company to repossess the apartment because when I asked him he said that he did not know anything about it and he made a Statutory Declaration saying that he did not authorise the breaking of the apartment.

THE TESTIMONY OF LOO YEW KEE @ LOH YEW KEE (SP2), THE HUSBAND OF THE PLAINTIFF

[29] The plaintiff's husband took the stand and testified that the renovations to the said apartment were made and paid for by the plaintiff. He explained to the court that some of the invoices produced by the plaintiff and issued in respect of the items and materials purchased to renovate the said apartment were in his name. According to him, it did not matter in whose name the invoices were issued. If they had known that the plaintiff's brother by the name of Chua Thiam Singh referring to the second defendant would

dispute that the renovations were made to the said apartment, they would have ensured that the invoices were all issued in the name of his wife. Under cross-examination, he categorically said that his wife, the plaintiff had paid for the renovations to the said apartment.

THE EVIDENCE OF THE PLAINTIFF'S BROTHER BY THE NAME OF CHUA THIAM KIN (SP3)

[30] His testimony supported the plaintiff's case. He testified that he had willingly signed the copy of the letter of undertaking that was given to him by the plaintiff when the plaintiff requested him to do so in order to secure her interest when she felt threatened after the second defendant had sent a letter of demand to the plaintiff demanding the arrears of the rentals to the said apartment. In his letter addressed to the plaintiff dated 12 July 1996 that was marked as exh P70 and found at p 108 of bundle 'B', he stated that he was amazed that the second defendant was suing the plaintiff for the rental of the said apartment. He went on to say in his letter marked as exh P70 as follows:

> We all know that father had said that the apartment is yours. Anyway, I am surprised he went ahead with the suit without first getting the consent of all the directors of Land Development Specialist Sdn Bhd. I certainly did not sign any resolution to sue you on this matter.

[31] Of significance was his willingness to affirm a statutory declaration on 20 July 1999 as seen in exh P71 and found at p 107 of bundle 'B' and it was worded in this fashion:

> STATUTORY DECLARATION
>
> I, Chua Thiam Kin (NRIC No: 440401-10-5081 (3619078) of No. 1, Lorong 16/13A, 46350 Petaling Jaya, Selangor, Malaysian citizen of full age, hereby do solemnly and conscientiously declare as follows:
>
> (1) I am a Director of Land Development Specialist Sdn Bhd (hereinafter referred to as 'LDS') which is the owner of the apartment Unit A1 in Taman Gembira, No. 1, Jalan Mesraria, 58200 Kuala Lumpur (hereinafter referred to as 'the said Apartment').
>
> (2) I did not, as director of LDS instruct or authorise Khor See Seng to break into the said Apartment on 14th August, 1996.
>
> (3) The directors of LDS did agree that the said Apartment was to be a gift to CHUA CHENG WAN. This was a gift to her.
>
> (4) As a result of our promise to her, it is my knowledge that she conducted renovations on the apartment.

(5) Pending the issuance of strata title, CHUA CHENG WAN was in vacant possession of the said Apartment rent free.

(6) I verily believe the break in of the Apartment on 14th August 1996 was instructed by CHUA THIAM SINGH who acted on his own without my prior knowledge and consent.

And I make this declaration conscientiously and sincerely believing that this statement is true by virtue of the Statutory Declaration Act, 1960.

Sworn and affirmed by the)
Abovenamed CHUA THIAM KIN) Sgd. (Illegible)
In Petaling Jaya, Selangor on this)
20th July 1999.) Before me,
Rex C C Michael (Sgd. Illegible)
.....
Commissioner for Oaths

[32] But when he took the stand at the witness box, he changed his mind and this was what he said (see p 81 of the notes of evidence):

I have second thoughts about my witness statement after I had spoken to the second defendant

[33] Order 35A of the Rules of the High Court 1980 ('RHC') states as follows:

[ORDER 35A WITNESS STATEMENT

1 Evidence in chief by way of affidavit (O 35A r 1)

(1) Where the parties agree, the Court may allow any witness in an action commenced by writ to give his evidence in chief by way of affidavit tendered and read at the hearing before the witness is cross-examined on his affidavit.

2 Copy of affidavit to be furnished to other party (O 35A r 2)

(1) A copy of each affidavit tendered and read shall be furnished to the other party.

[34] A witness statement is a written statement of the witness by way of an affidavit and it is received as evidence in chief. It contains the evidence of the witness. The furnishing of the witness statement to the other party is designed to promote the fair disposal of the proceeding as well as to save costs. The

witness statement would identify the real issues and it encourages the parties to make an appropriate admission of fact. It removes the element of surprise and it gives the cross-examining party the advantage of knowing in advance what each witness will say in his examination-in-chief. By giving his evidence-in-chief by way of an affidavit, the witness is using his own words and the statement is made from the witness's own knowledge. In short, the witness statement is equivalent to the oral evidence which the witness would, if called to testify, give in evidence. It is rather surprising that Chua Thiam Kin (SP3) had a change of heart bearing in mind that he has agreed to give his witness statement under O 35A of the RHC. The interference by the second defendant must have been too overwhelming for him to withstand.

[35] My duty would now be to examine the evidence of Chua Thiam Kin (SP3), and I shall do so now. This witness agreed that he was aware of the plaintiff's claim against both the defendants and he gave the following salient evidence:

(i) He agreed that he was a director and a shareholder of the first defendant's company and had signed the letter of undertaking as per exh P58.

(ii) He agreed and he stated that he stood by what he had said in para 3 of the letter of undertaking (P58) and that was as follows:

> … at the request of Mr Chua Khay Leong (NRIC 2995171) who is the founding member of Land Development Specialist Sdn Bhd (LSD), the directors of LSD who are all the sons of the abovenamed hereby agree to transfer one unit of apartment designated as unit A1 (refer to attached plan) to Chua Cheng Wan (NRIC 3306252) who is the daughter of Mr Chua Khay Leong and sister to all the directors of LSD.

(iii) The letter of undertaking (P58) continued in this vein:

> This undertaking is hereby given by the directors of LSD that they will commit the company to transfer apartment Unit No: 1A to Chua Cheng Wan upon the issue of the strata title by the relevant land office. The directors of LSD confirm that the transfer shall be free of any monetary consideration.

(iv) He agreed that the land on which the 24 units of apartments were built was registered in the name of his step mother (Lim Chai Har), as well as in the name of his brother Chua Thiam Siew and in his own name. He agreed that the three of them did not pay for the purchase of the said land. He stated that his late father had purchased the said land in their names. He confirmed that when the said land was transferred to the first defendant's company, the

three of them were not paid any monies as vendors by the first defendant's company because the said land was purchased by his late father.

(v) He confirmed that his late father had a very strong control and interest in the first defendant's company because his late father was the founder member and had paid for and acquired all the assets and properties belonging to the first defendant's company.

(vi) He stated that the directors of the first defendant's company comprised of his late father, his three brothers and himself.

(vii) To a question, in examination-in-chief after he wanted to change some of the answers in his witness statement, as to who determined who shall be the directors and shareholders of the first defendant's company, he had in his witness statement stated that his 'father determined' the candidate. However, after he had discussed with the second defendant he rattled and he did not give a direct answer to the question and he said that the 'promoters of the company were his late brother Chua Seow Guan and the second defendant.' When pressed further as to whether Chua Seow Guan and the second defendant determined who shall be the directors of the first defendant's company, his answer was that 'the promoters appointed him and his younger brother.' And to a question as to whether the promoters determined that his father be a director of the first defendant's company, his answer was, 'I don't think so because he had no share in the company.' Finally, when asked if the two promoters also determined that his father be made a director of the company, he answered, 'I believe so'.

(viii) In his witness statement he had in answer to a question if there had been any change in the directorship or shareholding of the first defendant's company, he stated that upon the death of his brother Chua Seow Guan his son Chua Hun Hoon was appointed as director by his late father. However, after talking to the second defendant he said that 'after Chua Seow Guan had died the shareholders appointed Chua Seow Guan's son as a director.'

(ix) He agreed that he signed a statutory declaration marked as exh P71 as seen at p 107 of bundle 'B' in support of his sister, namely, the plaintiff's claim against both the defendants for their failure to transfer the said apartment to her.

(x) He agreed that he signed a letter marked as exh P70 that was tendered by the plaintiff to the court and that letter was worded in this way:

July 12, 1996

Dear Cheng Wan,

I am amazed that Thiam Singh is suing you through Land Development Specialist for rental of unit A1 Desaria Apartment. We all know that father had said that the apartment was yours. Anyway, I am surprised that he went ahead with the suit without getting the consent of all the directors of Land Development Specialist. I certainly did not sign any resolution to sue you on this matter. I will look into this matter.

Best regards,

Sgd: Illegible

…….

Chua Thiam Kin.

(xi) He said that he was aware that the plaintiff had renovated the apartment and had occupied it. He denied that the plaintiff was a tenant of the first defendant's company. He said that he believed that the apartment had been sold to a third party. And he did not know how much it was sold for. He then gave a list of the assets owned by his late father. He said that the second defendant controlled and ran the companies and assets that were acquired and owned by his late father.

(xii) He informed the court under cross-examination that he agreed to the contents of the letter of undertaking (P58) and that he had read para 3 therein before he signed it. He said that he knew that everybody had agreed to transfer the apartment to the plaintiff.

(xiii) He agreed fully with the statutory declaration that he had made and he too agreed that all the directors of the first defendant's company agreed to give the plaintiff the apartment in question.

(xiv) He was referred to the defendants' documents marked as exhs D79 and D80 when he was being cross-examined and he agreed entirely with the resolutions of the first defendant's company. Under re-examination, he agreed that the resolutions of the first defendant's company was carried out in 1997 and that his statutory declaration that was marked as exh P71 was affirmed by him on 20 July 1997.

THE EVIDENCE OF THE SECOND DEFENDANT — CHUA THIAM SINGH

[36] It was rightly submitted that the second defendant not only subverted the course of justice by discussing the case with the plaintiff's material witness by the name of Chua Thiam Kin just before the said witness took the witness

stand and had caused the said witness to change some of the answers in the witness statement, the second defendant had also tailored his evidence after listening to the evidence of the plaintiff. In the amended statement of defence, the defendants had categorically pleaded that the plaintiff had abandoned the apartment in the middle of 1990. In the defendants' lawyers letter of Messrs Raja & Lau dated 15 June 1994 marked as exh P27 and as seen at p 2 of bundle 'C2', the defendants' lawyers at para 3 of the said letter stated that:

> We are instructed to state that sometime in the middle of 1990 you moved out from the said premises and returned to Singapore without informing our client …

[37] The first defendant's letter dated 30 July 1996 to the plaintiff marked as exh P68 as found at p 29 of bundle 'C' had also alleged that the plaintiff had vacated the apartment in 1990. Even the alleged resolution passed by the defendants on 5 February 1997 as seen at p 2 of bundle 'D' and at the second paragraph of the 6th line, it stated as follows:

> Messrs Jaafar & Menon shall be appointed to act for the company in this matter including the filing for the court order to seek possession of the said property that has been vacated by the plaintiff since 1990.

[38] However, after the plaintiff had testified that she did not vacate the apartment in the middle of 1990 as alleged by the defendants and had been staying in the apartment until April 1991 when she followed her husband to Singapore (here, the plaintiff produced her EPF statements and her electricity and water bills to show that she was staying at the apartment for the whole of 1990 and that she had possession of the apartment until the second defendant broke into the apartment in 1996), the second defendant as well as his solicitors changed the defendants 'story' and alleged that the plaintiff had abandoned the apartment from 'the middle of 1990' to 'April 1991'.

[39] In assessing the evidence of the second defendant, it would not be out of place to regurgitate the following facts. That the second defendant informed the court under cross-examination that the first defendant had acquired the piece of land wherein the 24 units of apartment were built thereon from his stepmother and his brothers Chua Thiam Kin and Chua Thiam Siew for the total sum of RM400,000 and that the monies were credited into their accounts. But Chua Thiam Kin (SP3), one of the parties in whose name the piece of land was registered denied that they were ever paid any monies for the transfer of that piece of land into the name of the first defendant because according to Chua Thiam Kin (SP3) the 'property belonged to my father'.

[40] In the amended statement of defence, the defendants pleaded that they had no knowledge of the existence of the letter of undertaking and in the alternative the defendants averred that if there was a letter of undertaking, which was denied, that letter of undertaking was signed by only two of the directors of the first defendant. In his witness statement, the second defendant categorically stated that the first defendant did not issue any letter of undertaking to the plaintiff. However, the second defendant admitted that at a family gathering their late father agreed to give not only to the plaintiff but also to all the other daughters one unit of the apartment each and later the second defendant said that he prepared the letter of undertaking. The second defendant said that he told his late father that his late father was not the owner of the 24 units of apartment and, consequently, his late father could not give away the apartment units each to all the other daughters. But, under cross-examination, the second defendant admitted that at the request of his late father he had prepared the letter of undertaking and that he had requested his late father to have the letter of undertaking signed by all the directors and shareholders of the first defendant. The second defendant further admitted that he had prepared an undated letter found at p 26 of bundle 'C' and that he had handed the said letter together with the letter of undertaking to his late father. This piece of evidence certainly was consistent with the plaintiff's evidence where the plaintiff had stated that the original letter of undertaking and a copy thereof together with an undated letter as per exh P59 were given to her by her late father. So, it can be surmised that the second defendant's plea that he had no knowledge of the letter of undertaking in the amended statement of defence and the denial of the existence of the letter of undertaking was therefore false and untrue.

[41] According to the plaintiff, the original letter of undertaking carried the signature of her elder brother by the name of Chua Seow Guan as well as the signature of the second defendant. The second defendant feigned that he had no knowledge of the original letter of undertaking and he went on to say as follows:

> To my knowledge, my late brother Mr Chua Seow Guan also did not sign the document.

[42] The second defendant agreed that he had prepared the original letter of undertaking and that he had given the same to his late father for purposes of procuring the signatures of the shareholders and directors. When asked in cross-examination, as to how the second defendant would know if the late father had not procured the signature of his elder brother by the name of Chua Seow Guan since he had left it to his late father to do so and bearing in mind that Chua Seow Guan had died in the late 1990, the second defendant's answer was that he had spoken to Chua Seow Guan's wife and son

by the name of Chua Hun Hoon. When questioned further as to when the second defendant spoke to Chua Seow Guan's wife and son, he replied matter of factly in this way:

> Off and on over the years.

[43] However, the second defendant did not call Chua Hun Hoon as his witness in order to lend credibility to the second defendant's story. It must be borne in mind that Chua Hun Hoon was appointed as a director of the first defendant after the death of his late father and he was actively involved in the first defendant's company. Chua Hun Hoon was not brought in as a witness to support the second defendant's allegation that the said Chua Hun Hoon had told him that Chua Seow Guan did not sign the original letter of undertaking contrary to the evidence of the plaintiff. To call Chua Hun Hoon as a witness would certainly help the second defendant. It must be borne in mind that anyone is a competent witness in any proceeding. It is said that a witness who is competent may be called to give evidence and if competent may be compelled by the court to give evidence (*Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380). In short, all competent witnesses are compellable. Yet, Chua Hun Hoon was not called as a witness by the second defendant.

[44] It must be recalled that the plaintiff informed the court that her late father handed over to her the original as well as a copy of the letter of undertaking while she was at her late father's tannery. It must also be recalled that the second defendant admitted that he prepared the undertaking and the undated letter of undertaking as per exh P59. When questioned during cross-examination as to how many copies of the letter of undertaking that he had prepared, his answer was, 'I don't remember'. The second defendant was then referred to a letter dated 25 September 1997 from the second defendant himself to Chua Thiam Kin (SP3) and that letter was worded as follows:

> LAND DEVELOPMENT SPECIALIST SDN BHD
>
> Mr. Chua Thiam Kin
>
> No: 1 Lorong 13A/16
>
> 46350 Petaling Jaya
>
> RE: CLAIM OF APARTMENT UNIT A1 BY MADAM CHUA CHENG WAN
>
> (1) We would refer to the Directors' meeting held on 5 February 1997 wherein you did not show up, a copy of the Minutes of that Meeting was subsequently sent to you by the company secretary. Items 1 and 2 of the minutes dealt with the abovementioned matter and the appropriate cause of action to be taken.
>
> (2) We would refer to the AGM held on 23 June 1997 wherein you had

concurred with the action taken by the company pursuant to Item 3 of the Minutes of that AGM in reference to the Directors Meeting of 5 February 1997.

(3) For your ease of reference, the Minutes of these two meetings are enclosed.

(4) Our company's solicitors M/S Jaafar & Menon received a copy of a letter of undertaking dated 18 May 1990 from the plaintiff's solicitor. The said letter bear your signature purportedly agreeing to the contents of that letter.

(5) Based on the outcome of the AGM of 23 June 1997, your actions have been inconsistent and your response is now sought to state whether:

(a) When did you sign the said letter?

(b) Did you sign on the copy or original of the said letter?

(c) Do you now agree to the contents of the said letter?

Your immediate reply will be appreciated to enable our company's solicitor to complete the statement of defence. Please forward your reply to Messrs Jaafar & Menon at 1st Floor & Penthouse, No 45, Jalan Sultan Ismail 50250 Kuala Lumpur, Attention: Mr Allen Miranda.

Yours faithfully,

LAND DEVELOPMENT SPECIALIST SDN BHD

Signed (Illegible)

CHUA THIAM SINGH

Director.

[45] Now, the question posed under para (5) (b) of the abovementioned letter showed that the second defendant knew that there was an original as well as a copy of the letter of undertaking. If the second defendant did not know about the existence of the original and a copy of the letter of undertaking, as claimed by the second defendant, why did the second defendant specially asked Chua Thiam Kin (SP3) as to whether he signed on the original or the copy thereof? In my judgment, the second defendant knew very well that there was an original as well as a copy of the letter of undertaking. And that original was the one which the second defendant and Chua Thiam Kin (SP3) had signed upon.

[46] In regards to the fabrication of the evidence to show that the break in was sanctioned by the first defendant's company, I have this to say. The

second defendant was totally dishonest and had lied in court when he testified that the first defendant had resolved in the director's meeting that was held on 5 February 1997 to the effect that it would seek possession of the apartment and the resolution was ratified by the first defendant's directors in the AGM that was held on 23 June 1997. The witness statement of the second defendant merits reproduction particularly the answers to questions 17 and 18 and I shall do so now:

> Q: 17: On the 5 February 1997, did the first defendant convene a Board of Director's meeting?
>
> A: Yes
>
> Q: 18: What was resolved at the meeting?
>
> A: Amongst others the first defendant's company had agreed to defend the suit commenced by the plaintiff against the first defendant's company. The first defendant also resolved that since the plaintiff had vacated the property in April 1991, the first defendant would seek possession of the property and if the plaintiff refused to deliver vacant possession of the property, the first defendant will sue the plaintiff for rental arrears.

[47] Now, the resolution allegedly made on 5 February 1997 stated that the first defendant would seek possession of the apartment if the plaintiff refused to deliver vacant possession. As against this, one must not overlook the fact that the second defendant had by a letter dated 30 July 1996 that was marked as exh P68 as found in bundle 'C2' and which letter was addressed to the plaintiff and her husband in Singapore stated that the second defendant would break the lock on 14 August 1996 and enter the apartment and regain possession if the plaintiff did not remove all her moveables and personal items within 14 days of the said letter. So it can readily be surmised that the alleged resolution dated 5 February 1997 ran counter to the contents of the letter dated 30 July 1996. The second defendant then instructed his employee by the name of Khor See Seng (SD2) to break into the apartment on 14 August 1996 and the second defendant then took possession of the said apartment and kept the plaintiff out of the said apartment. According to the plaintiff, she had maintained the apartment and had paid the bills until the second defendant broke in forcefully on 14 August 1996 and locked her out for good. Under cross-examination, this was what the plaintiff said in regards to the break in (see p 69 of the notes of evidence):

> What I meant was that I could not enter the apartment because he changed my padlock. He must have used a crowbar to force the iron gate open because the latch on the inside where I put the padlock was broken and I have an extra thick chain sort out coiled around the iron gate. He must have used a strong cutter to cut the thick chain. I don't know how he did it.

[48] After threatening to break into the apartment and, in fact, the second

defendant through Khor See Seng (SD2) had actually broken into the apartment on 14 August 1996 and forcibly taking possession of the plaintiff's apartment, the second defendant fabricated the resolution dated 5 February 1997 whereby it was 'resolved that since the plaintiff had vacated the property in April 1991, the first defendant would seek possession of the property and if the plaintiff refused to deliver vacant possession of the property, the first defendant will sue the plaintiff for rental arrears.' All these showed the extent to which the second defendant would lie to achieve his desired goal.

[49] The fact of the matter was this. That the plaintiff testified that she was in continuous occupation of the apartment until she followed her husband to Singapore in April 1991. The plaintiff proceeded further and had produced evidence to show that she had possession of the apartment until the second defendant broke into her apartment on 14 August 1996. The evidence was in the form of electricity and water bills that were issued by the authorities in 1996 and which bills she had paid in 1996. All these showed that the second defendant had concocted the story that the plaintiff had abandoned the apartment in 1991.

[50] As regards to the renovation of the apartment that was carried out by the plaintiff, it was pleaded by the plaintiff accordingly. It was pleaded that the plaintiff had renovated the apartment for the total sum of RM50,000. The plaintiff told the court that all her brothers including the second defendant were aware of the renovations and that her deceased brother by the name of Chua Seow Guan and his son Chua Hun Hoon were also aware of the renovations because they kept an eye on the renovations. However, the defendants in their pleadings denied that the plaintiff had renovated the apartment and they put the plaintiff to strict proof thereof. It was only after the plaintiff had painstakingly proved to the court that the renovations were carried out by producing practically all the invoices and the photographs that the defendants agreed that the renovations were carried out.

[51] The reluctance of the second defendant to effect the transfer of the apartment to the plaintiff was because she assisted her sister who was and is residing in the United States of America to file two suits against the second defendant personally. The first civil suit would be Civil Suit No S2–22–434–92 that was filed in the Kuala Lumpur High Court (see exh P64), and there the plaintiff's sister by the name of Chua Ching Siew filed a claim against the second defendant personally for:

(a) collecting rental in respect of a four storey house known as No 118, Jalan Bukit Bintang and not accounting to Chua Ching Siew who had 1/8 share in the property and which rent was collected by the second defendant;

(b) for having sold the said property in breach of the power of attorney to a company by the name of Saharaya Holding Sdn Bhd, where the shareholders comprised of the second defendant and his wife, for the sum of RM400,000 when the market price was RM450,000; and

(c) ailing to remit the purchase price to Chua Ching Siew as well as the failure to render a true account of the rent collected.

[52] The second civil suit would be civil suit no: D2-22-142-1996 that was filed in the Kuala Lumpur High Court (see exh P67) and there Chua Ching Siew filed another suit against the second defendant personally as well as against the second defendant's company and Chua Khay Leong & Sons. This time the plaintiff's sister sued the second defendant and his company for the fraudulent transfer of her 20,000 Chua Khay Leong shares with a per value of RM1 and forging her signature on the transfer form. The second defendant subsequently entered into a consent judgment with Chua Ching Siew whereby he agreed to pay her the sum of RM160,000 in respect of Civil Suit No D2–22–142–1996 and he too agreed to execute a deed over the property known as number 6380 Claremont Avenue, Richmond, California in her favour. Angered by the assistance that was rendered by the plaintiff to Chua Ching Siew, the second defendant turned against the plaintiff. It was submitted that the second defendant had deprived the plaintiff of her entitlement to the apartment.

[53] The defence of the second defendant was that the late father was not a shareholder of the first defendant's company and so the late father was not in a position to give the apartment as a gift to the plaintiff without the consent of the first defendant's company. But it must not be forgotten that the late father too had granted a gift to the second defendant in the form of 25% share in the first defendant's company. The late father too gave to all his other sons the same gift – the right to 25% of the shares in the first defendant's company. If the late father could grant a gift to all the sons, why can't the late father too grant a gift to all his daughters? Why must the gift of the apartment to the plaintiff be questioned by the second defendant when he himself benefitted from the gift that was given to him by their late father? In adjudicating this case, I must look at the reality of the situation that occurred many years ago in a wealthy Chinese family. The late father had told the plaintiff about the gift of the apartment to her and about giving a unit of apartment each to all his other daughters. This was in 1987. The plaintiff took possession of the apartment in May 1988 and moved therein and renovated the same for RM50,000. The declaration of the gift to the plaintiff was announced by the late father at a Chinese New Year reunion dinner. It was an auspicious occasion and the request of the late father was like an order. All the sons were subservient to the late father. All the sons will not dare to

go against the wishes of the late father for fear of offending the wealthy patriarch who may well cut them off their inheritance. A

[54] To say as was said by the defendants that the plaintiff's claim was confined only to the breach of the letter of undertaking was certainly wrong. There were, in fact, other grounds. At para 10 of the amended statement of caim, it was averred that the plaintiff was in possession of the apartment as a beneficial owner pursuant to the representation by the plaintiff's late father and pursuant to the agreement referred to at para 7 of the amended statement of claim which concerned the announcement by the plaintiff's late father at the Chinese New Year reunion dinner. In her prayers, the plaintiff too asked for, besides an order for possession of the apartment, specific performance of the undertaking dated 18 May 1990 pursuant to the agreement to give the apartment as a gift to the plaintiff as well as for a declaration that the first defendant was holding the apartment on trust for the benefit of the plaintiff. The plaintiff sought for a declaratory relief in her favour and it was done for the purpose of clarifying her legal position (*Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657 at p 673; *Datuk Syed Kechik bin Syed Mohamed v The Government of Malaysia and Sabah* [1979] 2 MLJ 101). According to Raja Azlan Shah Ag LP (as His Majesty then was) in *Dato Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 a declaration can be applied in a 'wide range of circumstances' and to a 'wide variety of cases in terms of subject matter'. Section 41 of the Specific Relief Act 1950 makes provision for a declaratory decree. Any person who is entitled to any 'legal character', or to any 'right as to any property' may institute a suit against any person denying, or interested to deny his title to the 'character' or 'right'. There is also O 15 r 16 of the RHC which states as follows: B C D E F

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed. G

and under this rule, the plaintiff needs only to establish that his legal interests are peculiarly affected (*Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177; and *Lim Cho Hock v Speaker, Perak Legislative Assembly* [1979] 2 MLJ 85). In the context of the present case, the plaintiff has succeeded in establishing that her legal interests were affected. In the amended reply to the defendants' defence, the plaintiff pleaded that she is the beneficial owner of the apartment and that the first defendant is holding the said apartment on trust for the plaintiff. And at para 11 of the plaintiff's amended reply and defence to the counterclaim, the plaintiff pleaded that her claim is, amongst others, based on contract, trust, trespass and estoppel. In my judgment, the plaintiff had pleaded her case succinctly. The pleadings were drafted professionally and it reflected the pith and depth of her claim. H I

[55] It must be recalled that the plaintiff had asked for specific performance of the letter of undertaking dated 18 May 1990 and the plaintiff too had asked for an order that the apartment be transferred to her. But, in the course of cross-examination of the second defendant, it was revealed that the apartment was sold to a third party in the year 2000 for the sum of RM150,000. The plaintiff made a search at the land registry since the strata title had been issued for the said apartment and it was revealed that the apartment was sold for RM249,500. Now, in view of the fact that the second defendant is the only director and shareholder of the first defendant who had after agreeing and executing the letter of undertaking dated 18 May 1990 denied the plaintiff of her right and entitlement to the said apartment and had wilfully and in breach of trust of that undertaking sold off the apartment to a third party, an order must now be made against the defendants for the damages suffered by the plaintiff to be assessed by the senior assistant registrar.

[56] Specific performance is a decree issued by the court directing the defaulting party to do that which he has promised to do. It is an equitable remedy and it shows that equity, at times, acts in personam. It is a decree that will ultimately do justice between the parties (*Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 at p 228). The usual remedy for breach of contract is the recovery of damages. This is a common law remedy. Of course, it is the duty of the plaintiff to show that the loss in respect of which she claims damages was caused by the defendants' wrong. Here, the apartment has been sold by the second defendant to a third party and since the subject matter is no longer available for this court to order specific performance, damages would be the best remedy. And that damages in order to be recoverable must not be too remote (*Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133 *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Ptd Ltd* [1994] 1 MLJ 553, [1994] 1 AMR 529; *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 582, [1994] 3 AMR 2407; *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 784, [1995] 1 CLJ 15, [1995] 1 AMR 41; *Karintina Trading Pte Ltd v Cornelder's (Sabah) Sdn Bhd* [1995] 2 CLJ 604 at p 623; *Wai Wing Properties Pte Ltd v Ganesh & Liu (sued as a firm)* [1994] 3 SLR 101 at p 117; *Au Yong Kun Min v Tractors Malaysia Bhd* [1997] 5 MLJ 168; *Emko Properties Sdn Bhd v Lee Choong Kheng* [1997] 2 CLJ Supp 133; at p 147; *Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd* [1997] 5 MLJ 121 at p 381; and *Bee Wan Plastic Factory Sdn Bhd v Francis Soh Kai Shuen b/s Shatin Marketing & General Agencies* [1997] 4 MLJ 545 at pp 551–552) and it is certainly not remote here. The causal link is there. When we talk about damages, the remoteness of the damage will also come into the forefront. And *Hadley v Baxendale* (1854) 9 Ex 341 defined the scope of damage as the appropriate barometer of compensation and it excluded the rest which are too remote. This would be followed by the

manner of evaluating the damage in terms of money and it is called the measure of damages. The general rule is that the innocent parties are entitled to such damages as will put them in the position they would have been in if the contract had been performed. The Latin phrase commonly used is *restitutio in integrum*. So far as money can do it, the innocent parties are to be restored to the position they would have been in had that particular damage not occurred at all (*Robinson v Harman* (1848) 1 Ex 850; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at p 307; *The Edison* [1932] P 52 at pp 62–63; *B Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740 at p 745 and *JD'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329.

[57] The general principles may be stated in this fashion. That the sum awarded for breach of contract or, as happened here, for breach of the undertaking to give the apartment to the plaintiff will be calculated so as to compensate the injured party rather than to recover any profit made by the party in breach. But, recently the House of Lords in *Attorney General v Blake* [2000] 4 All ER 385 has indicated that, very exceptionally, recovery of the profit of the party in breach is possible. The facts in Blake's case may be stated as follows. Blake was employed as a member of the Secret Intelligence Service from 1944 to 1961 and at which point of time it was discovered that he had been betraying secrets to the Soviet Union since 1951. He was convicted and sentenced to 42 years imprisonment but he escaped to Moscow in 1966. In 1989 he wrote his autobiography and it was published in 1990. The action arose out of the amount he was paid by the publishers in the United Kingdom. By the time Blake wrote his autobiography, the information contained in it had ceased to be confidential and recovery of his profits was not available on that basis. However, when Blake joined the Secret Intelligence Service, he had signed a contractually binding undertaking that he would not disclose official information in the press or in book form. He had, therefore, breached the contract when he made some of the disclosures in the book. On that basis the House of Lords held, with Lord Hobhouse dissenting that the Attorney-General was entitled to succeed in recovering the profits of Blake's autobiography. The House of Lords made it abundantly clear that such an award would only be made in exceptional cases. Lord Steyn equated the close relationship of the case to those cases in which there are disclosures of confidential information. Lord Nicholls, with whom Lord Goff and Lord Browne-Wilkinson agreed, saw no reason as to why, in practice 'the availability of the account of profits need disturb settled expectations in the commercial or consumer world'. Lord Nicholls also emphasised that 'normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to breach of contract'. Lord Nicholls made it clear that it would only be in exceptional cases where those remedies are not available, that 'any question of an account of profits will arise'. Lord Nicholls,

in style, then gave some indication of what might make a particular case sufficiently exceptional. This was what he said (at p 398 of the report):

> No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

Lord Nicholls also took the view that the (see p 399 of the report):

> Crown had and has a legitimate interest in preventing Blake profiting from the disclosure of official information, whether classified or not, while (being) a member of the service and thereafter.

[58] Lord Nicholls also emphasised that members of the security services should not have any incentive to reveal information. His Lordship viewed it as of 'paramount importance that members of the service should have complete confidence in all their dealings with each other and that those recruited as informers should have the like confidence' (see p 399 of the report). And it was on that basis that his Lordship concluded that the 'absolute rule against disclosure, visible to all, makes good sense' (see p 400 of the report).

[59] Since the apartment was sold to a third party, the plaintiff now sought for other reliefs and as encapsulated in the general prayers worded as follows as against the first defendant:

> Such further and other reliefs as may be just and equitable

and the same general prayers appeared as against the second defendant in the following language:

> and other reliefs as may be just and equitable

[60] On the authority of the decision of Salleh Abas FJ in the case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, the general prayers as alluded to above must be given its full effect and this was also the same line of approach which I adopted in *Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan (Rahaz Sdn Bhd & Anor – Interveners) & Anor Application* [2001] 1 AMR 875. That being the case, the plaintiff was also entitled to be awarded exemplary damages for the conduct of the second defendant in selling the apartment to a third party when the trial was ongoing thereby depriving the plaintiff of obtaining the remedy of specific performance. In *Cheng Hang*

Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, Edgar Joseph Jr SCJ sitting in the High Court in Penang awarded exemplary damages against the defendants there for the acts of trespass when the defendants there with impunity and without any regard for the pending case and without waiting for a judicial decision on the rights of the plaintiffs there had entered the plaintiffs' farm by force and demolished the chicken coops, pig sties and structures and levelled their vegetable farm. Likewise here, the second defendant despite being represented by counsel and while the trial was ongoing sold the apartment to a third party. It must be borne in mind that the plaintiff did not at any time exercise her choice in abandoning her claim for specific performance or that she had any choice at all, for that matter, in view of the fact that the second defendant had sold the apartment after the trial had commenced and while the trial was still pending. In the statement of agreed facts filed before the commencement of the trial and after the case management, the defendants had confirmed that the land on which the apartment was built was in the name of the first defendant (Land Development Specialist Sdn Bhd). The trial continued on staggering basis and was postponed on several occasions and finally when it was continued and when the second defendant was being cross-examined, it was revealed, for the first time, that the apartment had been sold. With this new factual development, the plaintiff had no choice but to confine herself to the claim for damages.

[61] The defendants had raised issues that were not raised in their defence. No where in the defendants' defence did the defendants raise the issues of:

(a) that the alleged agreement and undertaking were not supported by the essential elements of a contract in particular there was no offer and acceptance, no consideration and/or no intention to create legal relations and as such cannot constitute a valid and enforceable contract; and

(b) that the alleged agreement, if any, was between the late father and the directors and shareholders of the first defendant and that the plaintiff was not privy to such an agreement and had no rights.

[62] The parties must certainly be bound by their pleadings. This is trite law. In *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22, MacIntyre FJ after citing a few authorities aptly said at p 25 of the report:

> Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut.

[63] In *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, Wan Hamzah SCJ, delivering the judgment of the Supreme Court, succinctly said at p 303 of the report:

> These issues brought up at the trial had not been pleaded in the Statement of Defence, and this was a contravention of O 18 r 8 of the Rules of the High Court, and therefore the contentions should not have been entertained (*Attorney-General v Lord Mayor etc of City of Sheffield* [1912] 106 LT 367).

[64] In *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, Edgar Joseph Jr J (as he then was) spoke of the need to prepare one's case on the basis of the issues disclosed in the pleadings.

[65] Paragraph 8 of the amended statement of claim alluded to the proposal of the late father at the Chinese New Year dinner in 1989 to give the apartment to the plaintiff as a gift. Section 26 of the Contracts Act 1950 deals with the exception to the rule that an agreement made without consideration is void. A gift does not require consideration under s 26 of the Contracts Act 1950 to be valid. And that section provides that a completed gift does not require consideration in order to be valid. And as between donor and donee, any gift actually made will be valid and binding even though without consideration. This is provided for in the explanation to s 26 of the Contracts Act 1950. The plaintiff was already in occupation of the apartment in 1988 after her late father agreed to give the said apartment to her in 1987. All that needed to be done was to effect a transfer of the strata title to the plaintiff when the strata title was issued by the land office. It was for this reason that the first defendant's company and the directors and shareholders gave the letter of undertaking because the apartment had for all intents and purposes been given to the plaintiff when all the shareholders agreed to give the said apartment to her. In a last minute attempt to salvage the sinking ship, so to speak, the learned counsel for the defendants argued that the undertaking was never brought up at the board meeting nor at the shareholders' meeting and that no memorandum of transfer was given in accordance with the National Land Code. It was even argued that no agreement was ever executed by the first defendant for such a transfer. But, alas, all these arguments were not pleaded in the defendants' defence and they ought not to be raised at all. They should be rejected outright.

CONCLUSIONS

[66] For the reasons as adumbrated above, I must give judgment in favour of the plaintiff with costs. The following reliefs were also ordered in favour of the plaintiff:

(a) that the market value of the apartment to be assessed by the senior

assistant registrar and payable to the plaintiff or if the market value of the apartment is agreed upon by the parties then the agreed sums should be paid to the plaintiff;

(b) that interest at the rate of 4% per annum on the market value of the apartment or at the agreed market value as agreed by the parties and such sums are to accrue from the date of the sale of the said apartment to the third party until the date of this judgment and thereafter interest at the rate of 8% per annum until the date of full realisation and payment of such interest to be made payable to the plaintiff;

(c) costs of the renovation of the apartment at RM50,000 to be made payable to the plaintiff;

(d) interest at the rate of 4% per annum on the sum of RM50,000 from the date of the sale of the said apartment to the third party to the date of this judgment and thereafter interest at the rate of 8% per annum until the date of full realisation and payment of such interest to be made payable to the plaintiff;

(e) damages for forcible entry against the second defendant that took place on 14 August 1996 when the second defendant broke into the apartment to be assessed by the senior assistant registrar and payable to the plaintiff forthwith and failing which an interest of 8% per annum shall accrue from the date of damages being assessed to the date of full realisation;

(f) exemplary damages awarded to the plaintiff against the second defendant by his arrogant and contemptuous action in selling the apartment to a third party while the trial was still ongoing thereby rendering nugatory the plaintiff's claim for specific performance and such exemplary damages to be assessed by the senior assistant registrar accordingly; and

(g) damages for the loss of use and enjoyment of the apartment from 14 August 1996 to the date of the sale of the apartment to the third party and such damages are to be assessed by the senior assistant registrar.

[67] I have taken an arduous route in writing this judgment. That was inevitable. Inconsequential issues were not ventilated in this judgment. Despite their differences, the parties conducted themselves admirably during the trial. Blood is certainly thicker than water.

Plaintiff claim allowed with costs.

Reported by Eugene Daniel Louis